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Issue Date: 06 April 2005.....

In the Matter of

ROOSEVELT OUSLEY
Claimant
v.
NORTH FLORIDA SHIPYARDS, INC.
Employer
And
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

Case No. 2004-LHC-00060
OWCP No. 6-186085

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Decision and Order

This matter arises pursuant to a claim for benefits filed under the Longshore Act by Roosevelt Ousley of Jacksonville, Florida. Mr. Ousley, while employed as a shipfitter/welder, sustained a lumbosacral strain or sprain on February 2, 2001, when he lifted a bulkhead plate. The parties agree that Claimant's average weekly wage is $634.97.

The issues in controversy are the date of maximum medical improvement, pre-existing injuries, and the work restrictions which Claimant must observe. Tr. 10. Claimant contends that was temporarily and totally disabled up to the date of maximum medical improvement, and, thereafter, became permanently and partially disabled. Tr.11. In the Employer's view, after the period of temporary disability, Claimant reverted back to level of his pre-existing condition with no residuals from the February 2, 2001 accident. Tr.13. He is, Employer argues, capable of returning to work in medium duty status which falls within the range of his previous job as a shipfitter/welder, and there are light duty jobs available within his restrictions if he cannot return to work as a shipfitter/welder. Tr. 14-15.

At the time of the accident, Ousley job as a first class shipfitter entailed "some" lifting but primarily burning plates off ships in preparation for the installation of new plating which he would lay out, cut, and, with a helper, tack

weld into place. Tr. 20-22. Following the accident, he worked briefly as a shipfitter, Tr. 31, Claimant testified that he was unable to perform his job as a shipfitter/welder, Tr. 26, because it involved climbing into and out of deep tanks, bending in cramped areas, and walking and lifting duties that exceed his physical capacity. Tr. 26-27; 43. He believes he could perform some of the duties in the fabrication shop. Tr. 44.

Claimant was subsequently placed on light duty as a fire watch in a guard shack, Tr. 23, 31, but was laid off on November 1, 2001. He returned about a month later in possession of medicine bottles, and was advised that he would need clearance from his physician to return with medication. Tr. 24; 36. According to Ousley, the Doctor told him "to take his time" and, as he describes it, he "came back too late." Tr. 24; 38. When he finally returned two or three weeks later, he was told he was terminated. Tr. 24; 38. He has not worked since, although he testified that he sought work, Tr. 33, and was supposed to get a job with AmeriForce at Tampa Ship, but "something went wrong" with his transportation. Tr. 25; *but see*, Tr. 40 (He was "gonna tell them what I wasn't going to be able to do, and they wasn't gonna let me do that, then they would just terminate me.")

Claimant testified that he had not sought work as a welder because it would require him to get into cramped positions for long periods of time, Tr. 35, weld overhead. Tr. 35-36. He testified that he would like to work in a job such as lead man, Tr. 39, applied for work as a shipfitter at Atlantic Marine, and wanted to try returning to work as a shipfitter, Tr. 45-47, but he was not hired. He also claims he sought non-maritime employment without success. Tr. 41-42. He believes he cannot return to work, Tr. 42, and claims that he still experiences pain in his low back which radiates into his calf. Tr. 28; 42.

Medical Evidence

Claimant was initially examined by Dr. Padua at the Industrial Medicine Group. Ex. 23. Dr. Padua's handwritten notes are largely illegible but what is clear is his notation that Claimant reported no history of previous back injury, his initial diagnosis of lumbar strain, and his release of Claimant to return to unrestricted duty on February 12, 2001. Ex. 23.

Dr. David Kemp, a chiropratic physician, was Claimant's treating physician from July 18, 2001 to September 12, 2001. Ex 12; Ex 13. Claimant was referred to him by the Employer. Ex 13 at 5. Dr. Kemp performed a physical examination, reviewed Claimant's accident history and symptoms, and diagnosed a lumbosacral

sprain/strain. From July 19, 2001 through September 12, 2001, he restricted Claimant to light duty with no lifting over 25 pounds. Ex 12 at 10. Dr. Kemp's stationary has an outline of the vertebrae column running down the center of the page, and although this outline partially obscures the lifting restriction imposed on September 12, 2001, it is legible, and I find he imposed a 25 pound lifting restriction on that date. Ex. 12 at 4. Claimant returned to Dr. Kemp on October 17, 2001, indicating that he could not return to light duty and Dr. Kemp performed four tests to determine if Claimant was malingering. Ex 13 at 13-15. Two of the tests were positive, Ex. 13 at 16; Ex 12 at 18 and Dr. Kemp concluded that "I think he can work. I think he is trying hard not to work, in my opinion." Ex. 13 at 20. Dr. Kemp testified that he placed Claimant at maximum medical improvement on September 21, 2001, without a disability rating. Ex 13 at 9-10, 18-9. Documents in evidence, however, indicate that Dr. Kemp placed Claimant at maximum medical improvement "as of 10/17/01…." Ex 12 at 2. On January 11, 2002, however, he released Claimant to work half days, 4-6 hours, with no prolonged standing(2hours) and no lifting over 40 pounds. Ex 12 at 1. Dr. Kemp opined that Claimant's symptoms resulted from a pre-existing condition exacerbated by the February 2, 2001 injury, Ex. 13 at 16; however, once Claimant reached MMI, Dr. Kemp believes his condition was due to his underlying pre-existing condition not the exacerbation. Ex.13 at 19.

Dr. Abraham Rogozinski, an orthopedic surgeon, examined on August 1, 2003, Claimant, prepared a report, Ex 15, and was deposed was deposed on April 8, 2004. Ex 16. He considered Claimant's symptoms, his work and medical histories, examination results, medical reports and records, clinical tests and x-rays, and functional capacity evaluations. Ex 15 at 1-3; Ex 16 at 5-7. He diagnosed Grade 1, L5-S1 spondylitic spondylolisthesis, L2-L5 spondylosis, and left sciatica. Ex 15 at 5; Ex 16 at 7- 9. In Dr. Rogozinski's opinion the initial functional capacity evaluation performed on December 16, 2002, see, Ex 8, was invalid, and he was unable to render an opinion about permanency, but he did opine that Claimant reached MMI on the date he saw him, Ex 16 at 10-11; Ex 16 at 15. He explained that his date of MMI was different from Dr. Kemp's because Claimant had a change of symptoms after Dr. Kemp saw him and was not able to work. Ex 16 at 16. Dr. Rogozinski concluded that Claimant's condition was causally related to the "2/5/2001" (sic) injury. Ex 15 at 4; Ex 16 at 9. Dr. Rogozinski did not give Claimant an impairment rating, Ex 16 at 14, and he opined that without an MRI, he would be reluctant to opine whether Claimant had reverted back to his baseline condition prior to the February 2, 2001 injury. Ex 16 at 14.

Dr. Rogozinski placed Claimant on "interim" restrictions that included occasional lifting of up to 35 pounds, no repetitive bending, twisting or lifting, and light to medium duty, and he found nothing that would prevent claimant from working an 8-hour day. Ex 16 at 14, 16-17.

Dr. Michael Scharf, and orthopedic surgeon, evaluated September 20, 2002. Dr. Scharf prepared a report dated October 1, 2002, and he was deposed on November 25, 2002. Ex 18; Ex.19. He considered Claimant's history, but noted that he had difficulty getting Claimant to describe his medical history. Ex 18 at 1; Ex 19 at 6. He examined Claimant and administered an x-ray, confirmed that he had back pain, but deferred rendering an opinion about his condition until he was provided Claimant's medical records. Ex 18 at 2. At deposition, however, Dr. Scharf learned that he had all of Claimant's medical records. Ex 19 at 7-8. He confirmed that the physical examination and tests he performed were essentially "normal." Ex. 19 at 8. He noted that Claimant has spondylolisthesis, a congenital abnormality, but he could not explain the basis for Claimant's complaints, and recommended an FCE, which would show the consistency or inconsistency of his effort. EX. 19 at 9-10;12. Pending an FCE, Dr. Scharf recommended that Claimant avoid heavy labor, and concluded that unless the FCE showed differently, Claimant was probably at MMI as of the date Dr. Kemp placed him at MMI. Ex. 19 at 10-12; 14-15. Surveillance tapes of Claimant's activity, in Dr. Scharf's opinion were consistent with consistent with the ability to perform light to medium duty work. Ex. 14-15; See, Ex. 21, Ex. 22.

Functional Capacity Evaluations

As previously noted, Claimant underwent two functional capacity evaluations. The report of the test performed on December 16, 2002, found, *inter alia,* Claimant capable of frequent bending and squatting, capable of lifting more than 35 pounds, and able to perform occasional overhead work. Ex. 8. Having reviewed its content, Dr. Rogozinski did not consider it a valid study. Ex. 16 at 11.

A second functional capacity evaluation was performed on July 29, 2004. Although the test reported that Claimant exerted sub-maximal and inconsistent effort, it found that he could, *inter alia*, continuously stand and reach, frequently bend, climb, squat and sit, and perform medium to heavy work. Ex. 9 at 1. The report referred to a physician the "final return to work decision." Ex. 9 at 1.

Vocational Evidence

Jerry Albert, a vocational rehabilitation counselor, prepared numerous reports and labor market surveys, *see*, Ex. 10 A-J, and he testified at the hearing. He reviewed Claimant's medical reports, physician depositions, Claimant's deposition, functional evaluation study results, and obtained labor market information. Tr. 48-51. Base upon the information available to him, Albert opined that Claimant has the capacity to work at medium duty jobs. Tr. 51; see also, Ex. 10 G. Taking into consideration the work restrictions imposed by Drs. Scharf and Kemp, Albert identified several jobs in the light/medium duty range that were approved by these physicians, and subsequently, identified several medium duty jobs of the type Claimant performed in the past, including shipfitting and welding, that were available in the Jacksonville area. Tr. 52-53; 55-56; Ex. 10F; Ex. 10J at 2. Albert testified that Claimant is a skilled worker with mechanical aptitude and a wage earning capacity of $14.55 per hour had he returned to his job as a shipfitter welder, Tr. 57; Ex. 10 J at 2, and $6.00 to $8.00 if he were limited to light duty approved by Dr. Kemp. See, Ex 10. F at 8-16.

He noted that the most recent FCE revealed that Ousley was able to perform medium to heavy work, could stand and perform overhead work continuously, climb stairs and ladders, and squat and sit. Albert testified the FCE also noted that Claimant had "inappropriate pain focus and the presence of abnormal behaviors." Tr. 57. Based upon validation/invalidation characteristics, he thought the finding that Claimant had the capacity to perform medium to heavy physical demand work could have been higher, but assuming it was correct claimant could return to his previous job as a shipfitter at North Florida Shipyards. Tr. 58.

Consistent with his opinion of Claimant's capacity to work, Albert identified both marine and non-marine jobs he deemed Claimant capable of performing. Tr. 59. Albert requested Drs. Scharf and Kemp to review the jobs he located, Ex. 10 E at 2-3. but he did not send them for approval by Dr. Rogozinski because he did not know Dr. Rogozinski was involved in the case. Tr. 62. The marine jobs included shipfitter, welder, leader man, and labor-type helper jobs, driving autos, operating machinery, and supervising others. Tr. 59-60; 71. On April 14, 2003, Albert found four jobs which were approved by Drs. Kemp and Scharf with wages ranging from $6.50 up to $9.00 per hour for parking lot sweeper driver, and concluded that Claimant's wage earning capacity was $9.00 per hour. Ex 10 E at 5, Ex. 10Ex. 10 B; Ex 10D. He agreed that Claimant would have difficulty with a job such as welder which required repetitive bending, Tr. 61, but he opined that

during periods of high demand for welders when, for example, the aircraft carrier *Kennedy* was undergoing service, employer's would readily accommodate a welder's physical limitations. Tr. 61. The record shows that Claimant applied to Atlantic Marine for a welder job during a period of high demand yet he was not hired, a situation the created an inexplicable "cognitive dissonance for Albert. Tr. 76-79. Albert noted further, however, that demand has since tailed off, but he testified that welder and shipfitter jobs are still available in the Jacksonville labor market. Tr. 70-72

As of January 11, 2002, Dr. Kemp restricted claimant to working only 4-6 hours per day and lifting no more than 40 pounds. Tr. 64. Albert did not know whether any of the marine jobs he identified would accommodate Claimant's need for part-time work at that time. Tr. 64. He noted that Dr. Rogozinski restricted Claimant to light-medium duty work which avoided repetitive bending and twisting, and that with those limitations there were maritime "jobs that he probably could do depending on the specific task…." Tr. 64-65.

Albert acknowledged that the DOT describes the job of shipfitter as heavy labor, but he evaluated the job at Atlantic Marine as medium duty because it required frequent lifting of up to 50 pounds and "the local labor market demonstrates that the shipfitter is in the medium range, local being Jacksonville." Ex. 10K at 3; Tr. 67-68.

Turning to the non-marine jobs, Albert identified numerous light to medium duty jobs which paid in the range of $8 to $12.00 per hour, 20 to 40 hours per week. Albert located non-maritime jobs that were consistent with the restrictions imposed as of January 11, 2002, and were approved by Dr. Kemp and Dr. Scharf. These jobs include sewing machine operator, full or part time at $8.00 per hour; and assembler, 4 hours per day, at $6.50 per hour. Ex. 10 E & 10F. In contrast, when he called Atlantic Marine to inquire about job availability, he did not he obtain information about the availability of part-time work consistent with the restrictions imposed by Dr. Kemp. Tr. 72.

James Spivey is Personnel Director at North Florida Shipyards. Tr. 85. He testified that immediately following the accident, Ousley was authorized to receive medical treatment from Dr. DePadua, and that Dr. Padua released him in mid-February, 2001 top return to duty as a shipfitter. Tr. 86. Subsequently, in July of 2001, he was placed on light duty by Dr. Kemp, Tr. 86, and worked in that capacity until a general layoff on November1, 2001. Tr. 87. Ousley was recalled

to his to original job as shipfitter on December 26, 2001, Tr. 92, and, as Claimant testified, he returned with medication. Tr. 88.

Spivey testified that Claimant was advised to get his doctor's permission to return to work with medication, and was given a week to ten days to respond. Tr. 89. When Claimant failed to report back in two to three weeks his position was filled and he was deemed to have abandoned his job. Tr. 90-91. Spivey testified that the job description of a shipfitter requires lifting up to 50 pounds. Tr. 93. He testified further, however, that few shipfitters lift that much because mechanical assistance is available to help them. Tr. 93. He testified further that, at the time claimant was recalled, the employer would have accommodated part-time work; however, it has ceased offering such accommodations. Tr. 93-94. He also noted that shipfitters are at times required to bend, crawl, and stoop, Tr. 95, but at other times, their job requires no bending. Tr. 94. As a lay-out person, for example, the job requires reading blueprints, laying out the material, and cutting it. Tr. 97. Spivey testified that the Employer makes accommodations to work within the restrictions of its employees who are on restrictions. Tr. 98.

Discussion

Claimant in this matter contends that he is entitled to temporary total disability compensation from the date of his lay-off on November 1, 2001 to date and continuing in addition to interest, penalties and costs. Claimant further contends that if his condition is permanent, but not total, he has suffered a loss of wage earning capacity. See, Tr. 10-11. The Employer responds that Claimant reached maximum medical improvement on October 17, 2001, after which he reverted back to his pre-injury condition with no loss of wage earning capacity.

Maximum Medical Improvement (MMI)

Initially, it should be noted that, contrary to Claimant's contention, his condition is no longer temporary. Drs. Rogozinski, Scharf, and Kemp all have assessed the permanency of his condition and are in agreement that he has reached MMI. The Employer, however, is mistaken in its assertion that the date of MMI is October 17, 2001, as determined by Dr. Kemp, and that "No other physician has opined that the MMI date should be different…." Emp Post-trial Memo at 2.

The record shows not only that Dr. Rogozinski placed Claimant at MMI as of the date he saw him on August 1, 2003, but that Dr. Kemp himself has provided

two different dates of MMI, October 17, 2001 as Employer observes, but a second on the September 21, 2001. Dr. Sharf opined that he agreed with the September, 2001, date of MMI designated by Dr. Kemp, but it unclear why he though that date was more reliable than The October 17, 2001 date Dr. Kemp also provided. It is also significant that on January 11, 2002, Dr. Kemp released Claimant to work half days, 4-6 hours, with no prolonged standing(2 hours) and no lifting over 40 pounds. Ex 12 at 1. The January 11, 2002, correspondence in which these restrictions appear seem to be the first contemporaneous indication in the record that Dr. Kemp increased Claimant's lifting restriction from 25 pounds to 40 pounds. *Compare* Ex. 12 at 1 *with* Ex. 12 at 2 and 4 *with* Ex. 13 at 9-11. Obviously, if Claimant's lifting restrictions improved between October, 2001, and January, 2002, as the record would indicate, It would appear that the October, 2001 date of MMI was premature. Further, although Dr. Kemp also released Claimant in October, 2001, to work half days, Dr. Rogozinski in August, 2003, placed upon claimant an interim lifting restriction of 35 pounds and found no reason he would be unable to work full time, 8-hour days.

Considering the conflicting dates of MMI reported by the three physicians who considered the question of permanency, I have accorded the greater evidentiary weight to the date of MMI designated by Dr. Rogozinski than the dates provided by Drs. Kemp or Scharf. Dr. Scharf's reliance upon the September of 2001, date provided by Dr. Kemp is refuted by Dr. Kemp's own later revision of MMI date to October 17, 2001. Yet, even the later date of October 17, 2001, provided by Dr. Kemp is questionable in light of the improved lifting restrictions he placed upon Claimant during the period from September, through January 11, 2002, with the highest weight limit on the later date.

It must also be noted that Dr. Kemp only released Claimant for part time work in October, 2001, and in January, 2002. Consequently, if Dr. Kemp's October 17, 2001 date of MMI is accepted as the Employer urges, the evidentiary weight of labor market survey data developed by the Employer, and many full time jobs it considered suitable, would be diminished by the fact that Employer's vocational expert identified only two part time opportunities. Further, while North Florida Shipyards may offer part time work during a period of acute demand, it does not routinely make such accommodations.

Thus, Dr. Rogozinski opined that August 1, 2003 is the date of MMI, and on that date, he imposed a slightly more restrictive interim lifting limit than Dr. Kemp imposed but he opined that there was no longer a reason for Claimant not to resume working an 8-hour day. Since it appears that Claimant's capacity to

perform sustained physical activity continued to improve during the period from September 21, 2001, through August 1, 2003, I conclude that the date of MMI is August 1, 2003.

Pre-existing Condition

The Employer argues that once Claimant reached MMI, his condition reverted to a pre-existing level caused by his spondylolisthesis which was temporarily aggravated by the February 2, 2001 accident. Thus, his current complaints and symptoms as well as his current restrictions, Employer asserts, are all due the pre-existing condition. Employer emphasizes further that: "Dr. Kemp throughout his deposition and in his notes of October 30, 2001, indicates that the Claimant's ongoing complaints were the result of a pre-existing condition and not that of the lumbar strain…." Emp. Post-Hearing Memo at 2. At his deposition, Dr. Kemp opined that after reaching MMI, Claimant reverted back to his pre-existing condition. Dr. Scharf agreed with Dr. Kemp. For the reasons which follow, I conclude that the record does not support the contention that merely reverted back to his pre-existing condition post-MMI.

Initially, Claimant is entitled to the presumption set for in Section 20 of the Act. Further, Dr. Rogozinski concluded that his current condition is causally related to the February 2, 2001 injury. Once the presumption is invoked, the record as a whole must be considered to determine whether the Employer has successfully rebutted the presumption. For the reasons which follow, I conclude that the employer has failed to rebut the presumption.

Although Dr. Kemp was Claimant's treating chiropractor, Dr. Rogozinski is an orthopedic surgeon, and it was Dr. Rogozinski's opinion that without an MRI, he would be reluctant to opine whether Claimant had reverted back to his baseline condition prior to the February 2, 2001 injury. A reasonable inference may be drawn from Dr. Rogozinski's observation that MRI results would be needed to determine whether Claimant had reverted to his pre-injury baseline. Yet, even if it is assumed that the existing data was sufficient to render such an opinion, it is unclear what information Dr. Kemp or Dr. Scharf employed in rendering their respective assessments that Claimant did, in fact, revert to his baseline after reaching MMI.

With respect to the pre-existing baseline to which Claimant allegedly reverted, neither Dr. Kemp nor Dr. Scharf cited evidence that Claimant suffered back pain or had any history of back complaints as part of his pre-injury baseline

medical history. The record does indicate that Dr. Padua reported; "no history of previous back injury" in his office notes that were often illegible but clear enough in this respect. Beyond that, the record evidence relating to Claimant's pre-existing condition shows only that he had, at the time of his injury, spondylolisthesis by x-ray, but the record does not show whether it was actually symptomatic before the February 2, 2001, injury, nor does it show the baseline restrictions the condition allegedly imposed. Consequently, in the absence of an MRI as suggested by Dr. Rogozinski or an explanation by Dr. Scharf or Dr. Kemp how they determined what Claimant's baseline symptoms, physical capacity, or restrictions were before February 2, 2001, I find I am unable to conclude that their opinions are either well-reasoned or supported by the medical evidence of record. Under these circumstances, the opinions of Drs. Kemp and Schraf do not constitute substantial evidence rebutting the presumption that Claimant's current condition is causally related to the February 2, 2001, injury as Dr. Rogozinski concluded.

For all of the foregoing reasons, I find and conclude that Claimant reached maximum medical improvement on August 1, 2003, and, thereafter, his condition was causally related to a work-related aggravation of his pre-existing condition.

Loss of Wage Earning Capacity

The Employer contends that Claimant retained the physical capacity to return to his job as shipfitter/welder as of October 17, 2001. The medical and vocational evidence, however, does not support that assertion. The record shows that the job of shipfitter is listed as a heavy duty occupation by the DOT, but allegedly entails medium duty requiring lifting of up to 50 pounds at North Florida's shipyard. Dr. Kemp, however, restricted Claimant to lifting 25 pounds as of September, 2001 and raised that to 40 pounds in January of 2001. Dr. Kemp's reference to a 40 to 50 pound lifting limit in his deposition is not consistent with the actual 40 pound limit he imposed and Dr. Schraf concurred. Further, although Mr. Spivey testified that a shipfitter's duties vary from light to medium from time to time, the record shows that lifting remains a job requirement, and Claimant's lifting limit is below the frequent 50 pound lifting requirements of the job offered by the Employer.

In addition, Dr. Kemp, released Claimant to return to work part time; however, the job offered to Claimant in December of 2001, was to return to job as a shipfitter, full time. Claimant was not released for full time work until August 1, 2003, and then with a 35 pound lifting restriction. Although Spivey testified that the Employer, at the time, would have accommodated Claimant's restrictions in

December of 2001, the record shows that the job it offered him in December of 2001 was not consistent with his restrictions. I am mindful that Claimant was terminated for failing timely to return with a physician's note authorizing his medication, but the fact remains that the job he was offered did not comply with Dr. Kemp's restrictions and was not suitable. Accordingly, the record shows that Claimant's injury prevented him from returning to his usual maritime employment as a shipfitter/welder.

Since Claimant has shown that she cannot return to her former job, the burden shifts to the Employer to establish "suitable alternative employment." New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir., 1981). Accordingly, Claimant must be deemed totally disabled unless the Employer can demonstrate the availability of suitable alternate employment.

Suitable Alternate Employment

Now, the Employer's burden of establishing suitable alternate employment has been discussed in the Second, Fourth, Fifth, and Ninth Circuits. P&M Crane Company v. Hayes, 930 F.2d 424 (5th Cir. 1990; and Rogers Terminal and Shipping v. Director, OWCP Program, Denartment of Labor, 784 F.2d 687 (5TH Cir. 1986); New Orleans Stevedore's v. Turner, 661 F.2d 1031 (1980); Lentz v. Cottman Company, 852 F.2d 129 (4th Cir. 1988; Diaosdado v. John Bloodworth Marine, 29 BRBS 125 (9th Cir. 1996); Hairston v. Todd Shipyards Corp., 21 BRBS 122 (CRT) (6TH Cir. 1988); Palombo v. Director, 25 BRBS 1 (CRT) (2ND Cir., 1991). Both Lentz and Diaosdado cases indicate that one job is insufficient as a matter of law to satisify the employer's burden. In Lentz, the court held that the identification of a single job opening as an elevator operator does not satisfy the "suitable alternative employment" standard. The rationale in Lentz suggests it would be unreasonable to expect that an illiterate Claimant would be able to seek out and secure a specific job. Hairston further suggests that it is not sufficient to point to general work a Claimant may be physically able to perform. The employer must identify specific jobs Claimant can perform.

There is, of course, conflicting authority. Under Hayes and Turner, Employer need only demonstrate that there were jobs reasonably available within Claimant's capabilities and as few as one or two specific available jobs within Claimant's specific capabilities. I note further that the Second Circuit in Palombo cited with approval, the limited burden Turner imposes upon the employer. It does not appear, however, that the Eleventh Circuit Court of Appeals, the Court with jurisdiction in this matter, has had an opportunity to address these issues.

Guided by the decisions discussed above, in assessing the availability of suitable alternate employment in this instance, two periods of disability need be considered. The first is the period from November 1, 2001, to August 1, 2003, during which Claimant was limited to part time duty prior to reaching maximum medical improvement, and the second period from August 1, 2003, to date and continuing when Claimant was released for full time work with restrictions imposed by Dr. Rogozinski.

Wage Earning Capacity
November 1, 2001 to August 1, 2003

Turning first to the period from November 1, 2001, to August 1, 2003, Albert testified that he thought maritime employers would be willing to accommodate need for part time work during periods of acute demand for labor, but he did not know whether any of the maritime jobs he identified, including auto driver, leader man, operating machinery, supervisor, or labor-type helper, would actually accommodate Claimant's need for part time work. Under these circumstances, it would be difficult to conclude that any of these maritime jobs were available to Claimant while he was restricted to part time duty.

Albert did, however, locate non-maritime jobs that were consistent with the restrictions imposed as of January 11, 2002, and were approved by Dr. Kemp and Dr. Scharf. These jobs include sewing machine operator, full or part time at $8.00 per hour; and assembler, 4 hours per day, at $6.50 per hour. The record further shows that the showing machine operator job was available as of June 10, 2002. Based upon the foregoing evidence, I conclude that the Employer has satisfied its threshold burden of establishing the availability of suitable part time work consistent not only with Hayes, Turner, and Palombo, but the more restrictive test imposed by Lentz and Hairston. Finally, the record shows that Claimant explored the availability of only one non-maritime job, Tr. 41-42, and I conclude that his non-maritime search for work was not a reasonably diligent search within the meaning of Palombo.

Nevertheless, the period from November 1, 2001 and August 1, 2003, must also be divided into two time periods. For the period November 1, 2001 to June 10, 2002, Claimant was temporarily and totally disabled, because Employer failed to demonstrate the availability of any suitable alternate non-maritime employment during this period. The first such job reflected in this record was available on June 11, 2002. Prior to that, the Employer failed to identify a specific job that was either suitable or available. *See*, Turner, Palombo, Lentz, and Hairston, s*upra*.

The employer did, however, demonstrate the availability of suitable alternate part time employment by establishing both Claimant's capacity to work part time with restrictions but also by identifying that a specific, suitable job opportunity available in his labor market as of June 10, 2002, *See*, Ex 10 F at 9, and another thereafter. Ex 10 F at 11. Considering Claimant's age, education, work experience, physical condition, his general capacity to work part time with restrictions, the availability of jobs suitable for him, and the fact that he failed to exercise reasonable diligence in seeking non-maritime work, I conclude that Employer has demonstrated that Claimant, as of June 10, 2002, had a realistic wage earning capacity of $7.25 per hour which represents the average hourly wage of the two jobs Employer identified as calculated in accordance with Avondale Industries v. Pulliam, 137 F.3d 326 (5th Cir. 1998).

Consequently for the period November 1, 2001 to June 9, 2002, I find and conclude that Claimant was temporarily and totally disabled. For the period June 10, 2002, to August 1, 2003, I find and conclude that Claimant was temporarily, partially disabled. Applying his hourly earning capacity to the part time restrictions Dr. Kemp and Scharf imposed, I conclude that for the period June 10, 2002, to August 1, 2003, Claimant had a wage earning capacity working up to 6 hours per day of $217.50 per week, and an injury-related loss of wage earning capacity amounting to $417.47 per week. (AWW of $634.97- $217.50 post injury wage earning capacity).

Wage Earning Capacity After August 1, 2003

I have previously determined that Claimant reached MMI on August 1, 2003. Thereafter, his wage earning capacity increased primarily because Dr. Rogozinski found nothing to prevent Claimant from working an 8-hour day, and several jobs, ranging from $6.50 per hour to $9.00 per hour as a parking lot sweeper, which previously were not consistent with his restrictions became available and suitable for him. Thus, Albert concluded that claimant has a non-maritime wage earning capacity of $9.00 per hour. Taking into consideration all of factors, and noting further that the most recent functional capacity evaluation performed on July 29, 2004, reported that Claimant exerted sub-maximal effort and inconsistent effort, and was capable of performing medium to heavy duty work, I conclude that Claimant's wage earning capacity post MMI is $9.00 per hour. In light of his sub-maximal effort on the FCE, post-MMI, I do not consider averaging of wages under Pulliam appropriate to the extent that it would tend to increase the loss and increase his compensation. To the contrary, the most recent functional

capacity evaluation indicates that Claimant may be capable of returning to previous employment; however, that finding cannot be entered here because the FCE notes: "Refer to physician for the final return to work decision;" and the record fails to reflect a physician decision returning him to medium/heavy duty work post-MMI and based upon the July 29, 2004 FCE.

For all of the foregoing reasons, then, I find and conclude that Claimant became permanently, partially disabled as of August 1, 2003, with a wage earning capacity of $360.00 per week ($9.00 per hour x 40 hours per week), and a loss of wage earning capacity amounting to $274.97 per week (AWW $634.97-$360.00 post MMI wage earning capacity=$274.97). Accordingly:

ORDER

IT IS ORDERED that Employer pay to Roosevelt Ousley, all benefits to which he is entitled, including but not limited to compensation, interest, and penalties for temporary total disability for the period November 1, 2001 to June 10, 2002, based upon an average weekly wage of $634.97, and;

IT IS FURTHER ORDERED that the employer pay to Roosevelt Ousley, all benefits to which he is entitled, including but not limited to compensation, interest, and penalties for temporary partial disability for the period June 10, 2002, to July 31, 2003, based upon a loss of wage earning capacity in the amount of $417.47 per week, and;

IT IS FURTHER ORDERED that the employer pay to Roosevelt Ousley, all benefits to which he is entitled, including but not limited to compensation, interest, and penalties for permanent partial disability commencing August 1, 2003, based upon a loss of wage earning capacity amounting to $274.97.

A

Stuart A. Levin
Administrative Law Judge